Criminal Revision No.48 OF 2003

Pawan Kumar ---------- Revisionist

Versus

State of Uttaranchal ---------- Respondents

Hon'ble M.M.Ghildiyal J.

The present Criminal Revision has been filed by the revisionist against framing of alternative charge by the Addl. Sessions Judge/ III Fast Track Court, Dehradun on 31.03.2003 in Sessions Trial No. 86 of 2002 State Vs. Pawan Kumar.

Facts of the case are that on 29.03.2002 informant lodged FIR against the accused/revisionist that the accused/revisionist compelled his mother Smt. Kala Devi to commit suicide with the result that Smt. Kala Devi committed suicide and subsequently she died because of burn injuries. While saving the life of Smt. Kala Devi brother of the informant also received serious injuries and subsequently he also died due to burn injuries. On the basis of the said information a case was registered against the revisionist u/s 306 IPC. The Investigating Officer investigated the case and recorded the statements of the witnesses u/s 161 Cr.P.C. The chargesheet was submitted by the Investigating Officer u/s 306 IPC. Learned Sessions Judge took cognizance u/s 306 IPC. On 3.8.2002 date for prosecution evidence was fixed as 28.08.2002.

During the trial on 20.03.2002 the informant in his examination-in-chief has given statement that on 29.03.2002 in presence of the informant the revisionist killed his mother by pushing her neck and his brother Mukesh by beating with Saria and thereafter burnt both the persons after sprinkling kerosene Oil.

The Addl. District Govt. Counsel (Criminal) moved an application before the trial court praying for alteration of charge of Section 306 IPC to Section 302 IPC and consequently by allowing the said application learned Additional Sessions Judge/III Fast Track Court, Dehradun vide his order dated 31.03.2003 framed alternative charge u/s 302 IPC against the revisionist.

Heard Sri R.P. Nautiyal learned Counsel for the revisionist and learned A.G.A.

The learned Counsel for the revisionist has submitted that the application moved by the Additional District Government Counsel (Criminal) was against the law and without considering the fact that the learned trial court illegally framed alternative charge under section 306 IPC to Section 302 IPC against the revisionist. He further submitted that the learned trial court has not given any opportunity to cross-examine the informant before altering the charge against the revisionist.

The learned Counsel for the revisionist has placed reliance on the judgment of Delhi High Court in the case of **Jatinder Kumar and others Vs. State (Delhi Admn.) reported in 1992 CRI.L.J. 1482** wherein the Hon'ble court in paragraph no.-5 has held as under:-

> "5.A bare reading of the aforesaid section show that the doubt has to be as to the nature of the offence and not about the facts. If in a given case, on the facts which can be proved by the prosecution, it is doubtful which of the offence the said facts will constitute the framing of charge in the alternative is permissible. Section 221 is not intended to be applied to a case where facts are in doubt. Ordinarily, an alternative charge cannot be framed in respect of distinct offences. The offence under S. 302 IPC and the offence under S. 306 are distinct. The ingredients of the two provisions are altogether different. The prosecution has to take a stand whether it is a case of murder or suicide. The prosecution cannot say that the accused has murdered the deceased and if the deceased has committed suicide, the accused has abetted the commission of suicide. The framing of such charge is not permissible under S. 221 of Cr.P.C. as there is a doubt about the facts which can be proved and in that eventually S. 221 of the Code has no application.

The learned Counsel for the revisionist has further relied on the judgment in the case of **Sangaraboina Sreenu Vs. State of A.P. reported in 1997-(SC2)-GJX-0771-SC.** In this case the appellant was acquitted u/s 302 IPC for which he was charged. The High Court has convicted the appellant u/s 306 IPC. The Apex Court in paragraph no. 2 of the aforesaid judgment has held as under:-

> "2. This appeal must succeed for the simple reason that having acquitted the appellant of the charge under Section 302 IPC, which was the only charge framed against him- the High Court could not have convicted him of the offence under Section 306 IPC. It is true that Section 222 Cr.P.C entitles a court to convict a person of an offence which is minor is comparison to the one for which he is tried

but Section 306 IPC cannot be said to a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 Cr.P.C for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof."

The facts of the case are different to the resent one and as such the aforesaid authority is not applicable in the present case.

Section 216 Cr.P.C. provides that any court may alter or add any charge at any time before the judgment is pronounced. The practice of altering or adding charge even at a later stage may be deprecate but when a case is made out from the evidence the court may at any time alter or add the charge before the judgment is pronounced. The Apex Court while dealing with this matter in the case of **Ram Kumar Laharia Vs. State of Madhya Pradesh and another reported in J.T. 2001 (2) SC-79** has held in paragraphs No.-8 and 9 as under:-

"8. The High Court, in Criminal Revision, by the impugned order has proceeded to disbelieve the evidence of the eye witnesses. The High Court has noted that, at this stage, the evidence was not to be weighed by the Court. But the High Court holds that the court could still assess the improbability or absurdity of the statement of the eyewitnesses. The High Court holds that the statements of the two witnesses Sandhyabai and Haribal were so absurd and improbable that no prudent person could ever reach a just conclusion that there was sufficient ground for proceeding against the accused for offences under Section 302 or Section 304 of the IPC.

9.In our view, the High Court has committed a patent error. As noted by the High Court itself, at this stage, it was not open for the court to weigh or assess the evidence. It was not possible for the court, at this stage, to come to a conclusion that this evidence was absurd or inherently improbable. Prima facie at least the 5 burn injuries support the case that the boy was not just electrocuted by a live wire falling in the river in which he was swimming. They prima facie suggest direct contact with the live wire. In this view of the matter, we are of the view that the order of the High Court cannot be sustained and it is set aside."

The Apex Court in the case of **Kanti Lal Chandu Lal Mehta Vs. State of Maharashtra and another, reported in AIR 1970 Supreme Court 359** has held as under:-

"The criminal Procedure Code gives ample power to the courts to alter or amend a charge whether by the Trial Court or by the appellate Court provided that the accused has not of face a charge for a new offence or is not prejudiced either by keeping him in the dark about the charge or in not giving a full opportunity of meeting it and

> putting forward any defence open to him, on the charge finally preferred against him. The power of the appellate Court is set out in Section 423, Criminal Procedure Code and invests it with very wide powers. A particular reference may be made to Cl. (d) of Sub-section (1) as empowering it even to make any amendment or any consequential or incidental order that may be just and proper. Apart from this power of the appellate Court to alter or amend a charge, Section 535, Criminal Procedure Code further provides that no finding or sentence pronounced or passed shall be deemed to be invalid merely on the ground that no charge has been framed unless the Court of appeal or revision thinks that the omission to do so has occasioned failure of justice and if in the opinion of any of these Courts a failure of justice has been occasioned by an omission to frame a charge, it shall order a charge to be framed and direct that the trial be recommenced from the point immediately after the framing of the charge."

The power to add or alter the charge is with the learned trial court. In the present case on the basis of FIR charge under section 306 IPC was farmed against the accused. However, during the trial the informant in his examination-in-chief has stated that in his presence the revisionist-accused killed his mother by pushing her neck and his brother Mukesh by beating with Saria and thereafter burnt both the persons after sprinkling kerosene oil and consequently the Additional Sessions Judge/III Fast Track Court Dehradun on the application of Additional Government Counsel (Criminal) framed alternative charge under section 302 IPC. The offence under section 302 IPC and the offence under section 306 IPC are distinct. The prosecution cannot say that the accused has murdered the deceased and if the deceased has committed suicide the accused has abetted the commission of suicide. No doubt the learned trial court has jurisdiction to add or alter the charge. Normally framing of alternative charge under section 302 IPC while earlier charge under section 306 IPC was framed cannot be permitted because both the offences are distinct. In such cases the trial court may exercise the power under section 216 Cr.P.C. after perusing the case dairy and medical report.

The learned Additional Sessions Judge only on the basis of examination-in-chief of the informant has framed alternative charge. In my opinion, in such a situation where alternative charge is to be framed under section 302 IPC the learned trial court should have considered the case diary as well as the medical report of the deceased.

For the reasons stated above the revision is allowed and the impugned order dated 31.03.2003 is quashed. The matter is remanded back to the learned trial court to pass order afresh in view of the observations made in the body of the judgment.

(M.M.Ghildiyal, J.)

June 2, 2003
MPS